Supreme Court of the United States

OCTOBER TERM, 1929.

No. 772.

MILLER BROTHERS COMPANY,

Petitioner,

vs.

LEKTOPHONE CORPORATION,

Respondent.

JOINT MOTION TO ADVANCE AND ASSIGN THE CASE FOR HEARING WITH CASE NO. 520.

Come now counsel for the respective parties in the above entitled cause and move that this case be advanced and assigned for hearing with the case of Lektophone Corporation vs. Rola Company, October Term, 1929, No. 520, and counsel make the following brief statement of the matter involved, and the reasons relied upon in support of the motion:

This Court, on January 27th, 1930, issued a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit in Lektophone Corporation vs. Rola Company on petition of the Lektophone Corporation. The ground stated in Lektophone Corporation's petition for that writ was:

"A conflict as to the scope of patent claims, on the substantially the same evidence of prior art and

substantially the same type of accused device exist between the Court of Appeals for the Ninth Circuit and the Court of Appeals for the Third Circuit."

The conflicting decisions were Lektophone Corporation vs. Rola Company, 34 F. (2d), 764 (C. C. A., 9); Lektophone Corporation vs. Brandes Products' Corporation, 20 F. (2d), 155 (C. C. A., 3).

In the instant case the patent in suit is the same as that involved in the Rola case and the accused devices are essentially the same as in the Brandes case and as in the Rola case. The instant case was brought for final hearing before Morris, D. J., at Wilmington, Del., in May, 1929. On January 23rd, 1930, Judge Morris filed an opinion (37 F. [2d], 580, p. 581 and Rec., p. 14) in which he said:

"The evidence in the case at bar differs in no substantial particular from that in the Brandes case. Hence the decree of this Court in the pending case must be dictated by the decision of the Circuit Court of Appeals in the Brandes case."

Appeal was perfected to the Circuit Court of Appeals for the Third Circuit in the instant case and petitioner asked this Court to issue a writ of certiorari to the Circuit Court of Appeals for the Third Circuit before that Court had passed on the case. The grounds stated in the petition for this writ were:

"1. There is a direct conflict between the decisions of the Court of Appeals for the Third Circuit, relied upon by the District Court in the case at bar (20 F. [2d], 155), and the Court of Appeals for the Ninth Circuit (34 F. [2d], 764) and Second Circuit (16 F. [2d], 10 and 16 F. [2d], 7).

"2. This Court has granted a writ of certiorari in the Ninth Circuit case and justice will be expedited by bringing this case from the Third Circuit for hearing simultaneously with the Ninth Circuit case."

This Court issued a writ of certiorari to the Circuit Court of Appeals for the Third Circuit on May 5th.

In view of the fact that the issues in the present case are substantially identical with the issues in the Rola case, it is believed that the instant case should be advanced and assigned for argument with the Rola case.

Respectfully submitted,

SAMUEL E. DARBY, JR.,
Counsel for Petitioner.

WILLIAM H. DAVIS,
Counsel for Respondent.